Supreme Court, U.S.
FILED

091251 FEB 8 - 2010

OFFICE OF THE CLERK

No. 09-

IN THE

SUPREME COURT OF THE UNITED STATES

DHRUBA PRADHAN,
Petitioner,

vs.

ERIC H. HOLDER, JR.,
Respondent

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LEE HARWELL, JR.
LAW OFFICE OF LEE HARWELL, JR.
3424 Carson Street, Suite 320
Torrance, California 90503
Telephone: (310) 542-9710
Facsimile: (310) 542-9850
Email: leehar@earthlink.net

Counsel for Petitioner Dhruba Pradhan

QUESTIONS PRESENTED FOR REVIEW

I. Whether the finding of likely safe relocation was based on substantial evidence sufficient to support the denial of Withholding of Removal under INA section 241(b) and the requested relief under the Convention Against Torture.

II. Whether the court evidence of past persecution creates the presumption that future persecution will occur.

III. Whether government's burden of proving safe relocation has been met.

IV. Whether the fact that Mr. Pradhan's father has lived in Katmandu without persecution since giving a 50,000 Rupie bribe to the Maoist terrorists to avoid persecution in November 1998 can be used as evidence that Pradhan will not be persecuted if sent back to Nepal.

V. Whether the fact that Maoists operate in Katmandu precludes a finding that Katmandu would be a safe relocation location.

VI. Whether the fact that a replacement passport was obtained is evidence of a lack of likelihood of persecution.

VII. Whether passage of time is evidence of lack of likelihood of future persecution.

TABLE OF CONTENTS

INTRODUCTORY STATEMENT 1

1. STATEMENT OF JURISDICTION 2

2. STATEMENT OF ISSUES 2

3. STATEMENT OF FACTS 4

4. ARGUMENT 8

A. STANDARD OF REVIEW 8

B. WITHHOLDING OF REMOVAL IS MANDATORY WHERE THE ALIEN'S LIFE OF FREEDOM WOULD BE THREATENED 9

C. THE PRESUMPTION IS THAT PRADHAN WILL SUFFER FUTURE PERSECUTION 10

D. THE FINDING THAT PRADHAN'S FATHER LIVES UNMOLESTED IN KATMANDU AFTER GIVING THE MAOIST TERRORISTS A 50,000 RUPIE BRIBE ONLY INDICATES THAT PRADHAN WILL HAVE TO BRIBE THE MAOISTS AS WELL THIS IS NOT EVIDENCE OF A SAFE RELOCATION

TABLE OF CONTENTS

LOCATION 11

D. MAOIST TERRORISTS OPERATE IN THE ALLEGED SAFE RELOCATION LOCATION– KATMANDU 12

E. OBTAINING A REPLACEMENT PASSPORT IS NOT EVIDENCE OF A REDUCED LIKELIHOOD OF FUTURE PERSECUTION 13

F. PASSAGE OF TIME IS NOT EVIDENCE OF LACK OF LIKELIHOOD OF FUTURE PERSECUTION 13

G. PETITIONER QUALIFIES FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE ACT 14

5. CONCLUSION 15

APPENDIX. a-1

TABLE OF AUTHORITIES

CASES

Al-Harbi v. I.N.S.
242 F.3d 882, 888 (9th Cir. 2001). 3

Ali v. Ashcroft
394 F.3d 780, 791 (9th Cir. 2005) 10

Arboleda v. U.S. Attorney General
___434 F.3D 1220 (11th Cir. 2006) 12

Bolanos-Hernandez v. INS
767 F.2d 1277, 1284 (9th Cir. 1984) 9

Bosede v. Mukasey
512 F.3d 946, 951 (7th Cir. 2008) 12

Chevron v. Natural Resources Defense Council, Inc.
467 U.S. 837 (1984) 8

Diallo v. INS
232 F.3d 279, 287 (2d Cir. 2000) 8

Gambashidze v. Ashcroft
381 F.3d 187, 192-94 (3rd Cir. 2004) 11

Gui v INS
280 F.3d 1217, 1225 (9th Cir. 2002) 8

Hoxta v. Ashcroft
319 F.3d 1179, 1184 (9th Cir. 2003) 13

TABLE OF AUTHORITIES

INS v. Aguirre-Aguirre
526 U.S. 415, 424-25 (1999) 8

INS v. Stevic
104 S.Ct. 2489, 2496 n.15(1984) 9

Makadji v. Gonzales
470 F.3d 450, 458-59 (2nd Cir. 2006) 10

Mejia-Paiz v. INS
111 F. 3d 720 (9th Cir. 1997) 8

Mema v. Gonzales
474 F.3d 412, 419 (7th Cir. 2007) 13

Perkovic v. INS,
33 F.3d 615, 623, n.7 (6th Cir. 1994) 13

Ruiz v. Gonzalez
479 F.3d 762, 767 (11th Cir. 2007) 11

Salazar - Paucar v. INS
281 F.3d 1069, 1076 - 77 13

Singh v. Ilchert
69 F.3d 375, 379-381 (9th Cir. 1995) 11

ADMINISTRATIVE DECISIONS

Matter of J-E-
23 I&N Dec. 291, 302 (BIA 2002) 14

TABLE OF AUTHORITIES

STATUTUES

8 U.S.C. § 1231(b) 9

8 U.S.C. § 1231(b)(3). 3

8 U.S.C. § 1252(a)(1). 2

REGULATIONS

8 C.F.R. § 208.16(b)(1)(I) 10

8 C.F.R. § 208.16(C)(2) 14

8 C.F.R. § 208.18 14

8 C.F.R. § 1003.1 (b)(2). 2

8 C.F.R. § 1242.21. 2

SECONDARY SOURCES

I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) 10, 11, 12, 13

INTRODUCTORY STATEMENT

Dhruba Pradhan, a citizen of Nepal, applied for Asylum, Withholding of Removal and Relief under the Convention Against Torture. The Ninth Circuit found that the Asylum Application was barred because it was not filed timely. The Ninth Circuit agreed that the IJ found that Pradhan had been persecuted by the Nepalese police and the Maoist terrorists in Nepal in the past. (Decision, p. a-4, Citation is the United States Court of Appeals for the Ninth Circuit Decision attached to the Appendix below.)

The Ninth Circuit also held that the additional finding by the IJ and the BIA that the IJ's determination that (1) changes in his family's situation in Nepal demonstrated that Pradhan's life or freedom would no longer be threatened, and (2) that Pradhan could avoid future threat to his life or freedom by relocating to Katmandu with the rest of his family. (Decision p. a-5.) The facts used to support the a return to Katmandu would not create a threat were that Pradham obtained a replacement passport in 2002 (Decision, p. a-5) the family has relocated to Katmandu and no member of his family has been arrested or harmed since Pradham left Nepal. (Id.)

Since there was a finding that a safe relocation location existed the Application for Withholding of Removal and request for relief under the Convention Against Torture were denied.

1. STATEMENT OF JURISDICTION

Petitioner, Dhruba Pradhan (hereinafter "Mr. Pradhan" or "petitioner"), seeks review of the Ninth Circuit Decision to affirm the removal order from the Board of Immigration Appeals (hereinafter "Board" or "BIA"). The Board had jurisdiction, pursuant to 8 C.F.R. §§ 1003.1 (b)(2) and 1242.21, to review the decision of the Immigration Judge (hereinafter "IJ") ordering Mr. Pradhan's removal, and denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture Act (hereinafter "CAT") in lieu of removal.

The Court of Appeal had jurisdiction over the matter pursuant to Section 242 of the Immigration and Nationality Act (hereinafter "INA" or "Act") 8 U.S.C. § 1252(a)(1).

The Court of Appeal decision was filed November 9, 2009. Under United States Supreme Court Rule 13 the Petition for Writ of Certiorari is timely if filed within 90 days. However, since that would have been Sunday February 7, 2010 the filing is timely filed or mailed by Monday February 8, 2010.

2. STATEMENT OF ISSUES

The finding of likely safe relocation was error. The Ninth Circuit held that the evidence that his father and family had not been persecuted since their move to Katmandu was evidence that Mr. Pradhan's relocation to Katmandu was likely to be safe. As a result the Withholding of Removal and CAT were denied. The error is in the evidence and the burden of

proof used in finding a likely safe relocation.

As the Ninth Circuit stated, to demonstrate eligibility for withholding of removal, Pradhan must prove it is "more likely than not" that his life will be threatened in Nepal because of his "race, religion, membership in a particular social group, or political opinion. (Decision, p. a-4, citing *Al-Harbi v. I.N.S.*, 242 F.3d 882, 888 (9th Cir. 2001); 8 USC section 1231(b)(3).)

However, not mentioned was the fact that once evidence sufficient to show that it is more likely than not that past persecution occurred, the burden switched to the government to prove that matters have changed for the better.

The Ninth Circuit admitted that the IJ found that Pradhan had been persecuted by the Nepalese police and the Maoist terrorists in Nepal in the past. (Decision, p. a-4.)

However, the Ninth Circuit also held that the additional finding by the IJ and the BIA that the IJ's determination that (1) changes in his family's situation in Nepal demonstrated that Pradhan's life or freedom would no longer be threatened, and (2) that Pradhan could avoid future threat to his life or freedom by relocating to Katmandu with the rest of his family. (Decision p. a-5.) The facts used to support the a return to Katmandu would not create a threat were that Pradham obtained a replacement passport in 2002 (Decision, p. a-5) the family has relocated to Katmandu and no member of his family has been

arrested or harmed since Pradham left Nepal. (Id.)

This ignores six problems. First, evidence of past persecution creates the presumption that future persecution will occur. Second, it ignores the government's true burden of proving safe relocation. Third, it ignores the fact that Maoists operate in Katmandu. Fourth, it ignores that fact that Mr. Pradhan's father gave a 50,000 Rupie bribe to the Maoist terrorists to avoid persecution in November 1998. Fifth, it improperly uses the fact that a replacement passport was obtained as evidence of a lack of likelihood of persecution. Sixth, it improperly uses passage of time as evidence of lack of likelihood of future persecution.

These six problems are ignored. When they are considered, there remains no substantial evidence to support a finding of safe relocation.

3. STATEMENT OF FACTS

At the time of his individual hearing with the IJ, the petitioner was a 23 year old native and citizen of Nepal. He testified that he and his family have been harassed by both the police and Maoist terrorists in Nepal. [AR 51]. He testified that the Maoists attacked his family on four occasions and subsequently destroyed their family owned furniture factory in 1999. [AR 151]. The factory was destroyed due to the blasting of four bombs. [AR 51].

The petitioner testified that the police first arrested him on October 1998. [AR 134]. The arrest

occurred at petitioner's farmhouse during the Dasra festival, which is one of the biggest festivals in Nepal. [AR 134]. His father and brother were also arrested. [AR 134]. The police took them to the police station and were told they were arrested for supporting the Maoists. [AR 135]. The police accused them of providing the Maoists an office space in their home. [AR 135]. They then beat the petitioner with boots. [AR 136]. Petitioner's brother was released after 4-5 hours of detention. The petitioner and his father, however, were held for two days and then released. [AR 136].

The petitioner testified that prior to the arrest, his family farm was taken over by Maoists. [AR 137]. He informed the police about these actions, but the police accused him of voluntarily giving the Maoists his farm. [AR 137].

On November 30, 1998, five Maoist terrorist, dressed in green fatigues and wearing guns, visited petitioner's home. [AR 138]. They demanded overnight lodging and donations for their cause. [AR 138]. Fearing for their lives, the petitioner and his family provided the terrorists lodging and food. The petitioner's father was also forced to give them 50,000 rupes. [AR 138].

The petitioner and his family reported this incident to the village development committee. The police were also informed, but did not take any material action. [AR 139].

On December 24, 1998, eight Maoist terrorists

with guns again appeared at petitioner's home. They told petitioner's father that they wanted to recruit his sons into their army. [AR 140]. They also demanded that petitioner's family provide them with a gun. [AR 140]. The petitioner refused and was beaten. The terrorists left exclaiming that they would return later. [AR 141].

On January 5, 1999, about 40-50 Maoists appeared at petitioner's home. [AR 121]. They broke into the furniture factory, demanded a gun, and ultimately beat the petitioner. [AR 141]. Three hours after the incident, the petitioner learned that another Maoist group entered their village. The petitioner and some of his friends went into hiding. [AR 142]. The petitioner later learned that the Maoists went to his home and abused his wife. [AR 142]. The Maoists also stated that they would kidnap the petitioner the next time they saw him. [AR 142].

The petitioner went to the police and reported the incident. However, the police arrested him stating they heard from villagers that he had voluntarily relinquished his gun to the Maoists. [AR 143]. These villagers were apparently in a land dispute with the petitioner's family. [AR 144]. The petitioner was detained for two weeks, beaten with bamboo sticks, and accused of supporting Maoist terrorist. [AR 144]. He was released after his father obtained help from an elected official. [AR 144].

After his release, the petitioner went to live with his uncle who resided in a far off village. [AR 146]. While he was living with his uncle, the Maoists came

to his home again looking for him. They also tried to kidnap his wife. [AR 147]. The police also came to his home and arrested his father and wife. Speaking to the father, the police accused the petitioner of supporting the Maoists. They also physically abused petitioner's wife. [AR 149].

The petitioner then went to Katmandu in March 1999 to live with his brother. [AR 151]. He then procured a visa and came to the United States. [AR 151]. While in the United States he learned that a warrant had been issued for his arrest in Nepal. [AR 151]. The warrant was apparently issued in May 2000. [AR 151]. He also testified that while his father and mother lived in Katmandu, his father would move around in order to avoid detection from the Maoists. [AR 154].

The petitioner entered the United States on June 4, 1999. [AR 95]. He came to the U.S. on a B1 visa. [AR 95]. He later changed his status to an F1 student visa because he began attending classes at Santa Ana Community College. [AR 95]. However, he ceased his studies on December 2001 because he was no longer receiving money from home to support himself and his wife who subsequently joined him in the U.S. before that date. [AR 97-99]. Petitioner also began working part time on campus. He also consulted a foreign students' office who told him to leave the country and return on a new valid student visa. [AR 97-99]. However, the petitioner chose not to leave the U.S. because his family informed him the political situation in Nepal was still poor. [AR 97-98]. Also, since the petitioner only had about one and a half

years of school remaining, he intended to return to school when he could financially support himself. The petitioner continued to have money problems throughout 2002, but decided in November 2002, based on the conditions in Nepal, that he could not return to his home country. As a result, based on a referral from a friend, the petitioner visited a lawyer in November 2002 to discuss his immigration status. [AR 113]. It was at this time that he learned he might be eligible for asylum based on his experiences in Nepal. His asylum application was filed on December 23, 2002. [AR 48].

On the basis of the foregoing facts, petitioner respectfully requests that the Court review this matter, and remand his case back for further consideration of his applications for relief under INA §§ 208(a) and 241(b), as well as his alternative request for protection under CAT.

4. ARGUMENT

A. STANDARD OF REVIEW

Questions of law and statutory construction are reviewed de novo. *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424-25 (1999); *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Factual findings underlying the denial of an asylum claim including findings regarding lack of credibility are reviewed for substantial evidence. *Mejia-Paiz v. INS* 111 F. 3d 720 (9th Cir. 1997); *Gui v INS*, 280 F.3d 1217, 1225 (9th Cir. 2002). See also *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (holding that the decision

below can be reversed "if no reasonable fact-finder could have failed to find the past persecution or fear of future persecution necessary to sustain the petitioner's burden.").

B. WITHHOLDING OF REMOVAL IS MANDATORY WHERE THE ALIEN'S LIFE OF FREEDOM WOULD BE THREATENED

Section 241(b) of the INA prohibits the Attorney General (AG) from removing an alien to a country where "such alien's life of freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b). Withholding of removal is not a discretionary form of relief. The Attorney General is required to grant withholding of removal, should he or she find that the alien meets the above stated requirements. Id.; *INS v. Stevic*, 104 S.Ct. 2489, 2496 n.15(1984).

In order to demonstrate eligibility for withholding of removal, the alien must demonstrate a clear probability of such persecution were he or she to be removed. That is, the alien must establish that persecution on one or more of the enumerated grounds is more likely than not to occur. *Stevic*, 467 U.S. 407; 104 S.Ct. 2489. Furthermore, general information concerning oppressive conditions is relevant to support specific information relating to an individual's well-founded fear of persecution. A specific threat directed against an individual is sufficient to trigger a withholding claim under the stricter "clear probability" of persecution standard even though the threat reflects a general level of violence in the country. *Bolanos-*

Hernandez v. INS, 767 F.2d 1277, 1284 (9th Cir. 1984).

C. THE PRESUMPTION IS THAT PRADHAN WILL SUFFER FUTURE PERSECUTION.

Evidence of past persecution creates the presumption that future persecution will occur. A finding of past persecution gives rise to a presumption that the applicant's life or freedom would be threatened for purposes of withholding of removal under INA section 241(b)(3). (8 CFR sections 208.16(b)(1)(I) and 1208.16(b)(1)(I); *Makadji v. Gonzales*, 470 F.3d 450, 458-59 (2nd Cir. 2006) [IJ reversed where citizen of Mauritania established past persecution and burden was not shifted to the government] ; *Ali v. Ashcroft*, 394 F/.3d 780, 791 (9th Cir. 2005) [where Somali clan member was gang raped by another clan, a finding of past persecution gave rise to the presumption of withholding of removal]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 460.)

The evidence of past persecution is not in dispute. "The IJ found that Pradhan had been persecuted by Nepalese police and Maoist terrorists in Nepal in the past." (Decision, p. a-4.) This created the presumption of future persecution.

Once evidence sufficient to show that it is more likely than not that past persecution occurred, the burden switched to the government to prove that matters have changed for the better. The government must bring affirmative evidence that the change has occurred.

It is the burden of the government to prove by a preponderance of evidence that the applicant could reasonably relocate. (*Ruiz v. Gonzalez* 479 F.3d 762, 767 (11th Cir. 2007) [ICE failed to establish by a preponderance of evidence that the applicant could reasonably relocate within Columbia; *Singh v. Ilchert* 69 F.3d 375, 379-381 (9th Cir. 1995); *Gambashidze v. Ashcroft* 381 F.3d 187, 192-94 (3rd Cir. 2004) [government must prove that relocation would be successful and reasonable]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 462.) At best, the government has some evidence – not even a preponderance of evidence – that Mr. Pradhan might be safe in Katmandu if he bribes the Maoists enough.

D. THE FINDING THAT PRADHAN'S FATHER LIVES UNMOLESTED IN KATMANDU AFTER GIVING THE MAOIST TERRORISTS A 50,000 RUPIE BRIBE ONLY INDICATES THAT PRADHAN WILL HAVE TO BRIBE THE MAOISTS AS WELL. THIS IS NOT EVIDENCE OF A SAFE RELOCATION LOCATION.

Mr. Pradhan's father gave a 50,000 Rupie bribe to the Maoists terrorists to avoid persecution in November 1998. [AR 138.] The giving of bribes to avoid persecution is evidence that the persecution would occur but for the bribe. Courts have uniformly rejected the very proposition that the Ninth Circuit has impliedly adopted (i.e., that Mr. Pradhan could avoid the persecution with a bribe just like his father did so relocation would be safe).

> "The Seventh Circuit has expressly held in a number of cases that suggesting that someone could use bribery to escape

> persecution is an 'irrational and altogether improper consideration in deciding a claim for asylum or other relief.' *Bosede v. Mukasey* 512 F.3d 946, 951 (7th Cir. 2008) [court was 'appalled that the IJ would rest its decision on the absurd proposition that Bosede could evade imprisonment, mistreatment, and possible death by approaching his jailers and trying to buy his way out']." (I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 589 [Bribery of Government Officials to Avoid Persecution].)

The fact that Pradhan's father and family is no longer persecuted by the Maoist terrorists after giving a 50,000 rupie bribe just indicates that Pradhan would have to do the same. It does not indicate that Katmandu is a safe relocation location.

D. MAOIST TERRORISTS OPERATE IN THE ALLEGED SAFE RELOCATION LOCATION–KATMANDU

Maoists operate in Katmandu. (*Arboleda v. U.S. Attorney General,* 434 F.3D 1220 (11th Cir. 2006) [where government conceded past persecution, its submission of a 1997 Asylum Profile and 1999 and 2000 DOS reports on Columbia did not establish that respondent could relocate to avoid the FARC which the court stated operates country-wide in Columbia]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 468.) Where a persecuting group operates throughout the country is cannot be assumed that any

place is safe.

E. OBTAINING A REPLACEMENT PASSPORT IS NOT EVIDENCE OF A REDUCED LIKELIHOOD OF FUTURE PERSECUTION.

The IJ, the BIA and the Ninth Circuit it improperly uses the fact that a replacement passport was obtained as evidence of a lack of likelihood of persecution. (*Mema v. Gonzales*, 474 F.3d 412, 419 (7th Cir. 2007) [ability to obtain passport by Albanian is not probative of fear of future prosecution because "governments are often all too happy to see undesirables and dissidents depart"]; *Perkovic v. INS*, 33 F.3d 615, 623, n.7 (6th Cir. 1994) [persecution is not inconsistent with legally obtaining a passport]; *Hoxta v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) [rejecting government's arguments that fear of persecution of Albanian in Serbia was belied by ease of applicant in obtaining a passport because Serbs wanted Albanians to leave]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 579.) Obtaining a replacement passport is not probative toward proving that Pradhan is not likely to be persecuted.

F. PASSAGE OF TIME IS NOT EVIDENCE OF LACK OF LIKELIHOOD OF FUTURE PERSECUTION.

Passage of time is not evidence of lack of likelihood of future persecution. (*Salazar - Paucar v. INS*, 281 F.3d 1069, 1076 - 77 [neither the passage of time because the case was pending at the BIA for six years, nor a 1993 Amnesty Report was sufficient to demonstrate changed circumstances in Peru]; I.

Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 463.)

G. PETITIONER QUALIFIES FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE ACT.

Pursuant to Article 3 of the U.N. Convention Against Torture And Other Cruel Inhuman or Degrading Treatment or Punishment, it is the policy of the United Nations that "no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her for a third person, or for any reason based on discrimination of any kind." 8 C.F.R. § 208.18.

The burden of proof standard applied to CAT claims is the same as that applied in withholding of removal claims under INA § 241(b)(3). In order to demonstrate eligibility for withholding of removal under the CAT Act, the petitioner must prove that he or she is "more likely than not" to be subject to torture upon removal. This standard allows a petitioner to prove his claim by his own testimony, if credible, without corroboration. 8 C.F.R. § 208.16(C)(2); *Matter of J-E-*, 23 I&N Dec. 291, 302 (BIA 2002).

The facts support a finding that petitioner would, more likely than not, be tortured again if he were to return to Nepal today. Thus, the IJ was compelled to withhold the removal of this petitioner. The IJ"s failure to grant petitioner relief under CAT was error, which he now requests the Court to reverse.

5. CONCLUSION.

The government's burden of showing that it is more likely than not that Pradhan will not suffer future persecution if he is sent to Katmandu is not supported by substantial evidence. Each fact pointed to by the IJ, the BIA and the Ninth Circuit (i.e., that Pradhan's father and family have not suffered persecution since the father and family relocated to Katmandu and that Pradhan was able to obtain a replacement passport) are, by themselves not probative of changed circumstances. When the ignored facts that the Maioists operate in Katmandu and that Pradhan';s father had to bribe the Maoists to stop the persecution are considered, the presumption that Pradhan will suffer future persecution if he goes to Katmandu remains unrebutted.

Withholding of Removal should have been granted. Relief under the Convention Against Torture should have been granted.

Date: Feb. 5, 2010

Respectfully Submitted
Lee Harwell, Jr.
Law Office of Lee Harwell, Jr.
3424 Carson Street, Suite 320
Torrance, CA 90503
Telephone: (310) 542-9710

Facsimile: (310) 542-9850
Email: leehar@earthlink.net
Counsel for Petitioner,
Dhruba Pradhan

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
November 09, 2009
Molly C. DWYER, CLERK
U.S. COURT OF APPEALS

DHRUBA PRADHAN, Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General, Respondent.

No. 05-74039
Agency No. A096-160-953

MEMORANDUM

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted November 5, 2009 **
San Francisco, California

Before: GOODWIN and W. FLETCHER, Circuit Judges, and MILLS,*** Senior District Judge

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R 36-3

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

Dihruba Pradhan, a native and citizen of Nepal, petitions for review of the Board of Immigration Appeals' ("BIA") affirmance of the immigration judge's ("IJ") decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We hold that the BIA's decision is supported by substantial evidence and deny the petition for review.

We review for substantial evidence the decision determining whether an alien has established eligibility for asylum or withholding of removal. *Malkandi v. Holder*, 576 F.3d 906, 912 (9th Cir. 2009). We have jurisdiction to review the BIA's denial of withholding of removal under 8 U.S.C. § 1252(a)(1).

We reject the government's contention that we lack jurisdiction to review the BIA's denial of Pradhan's asylum request under 8 U.S.C. § 1158(a)(3). Under 8 U.S.C. § 1158(a)(2)(B), an alien seeking asylum must file an application within one year of arrival in the United States, unless one of two statutory exceptions applies. *See* 8 U.S.C. § 1158(a)(2)(D) (late applications may be considered "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application"). The alien must also demonstrate that the application for asylum was filed within a reasonable amount of time after the changed or extraordinary circumstances. *See* 8 C.F.R. §§ 208.4(a)(4)(ii), 208.4(a)(5)(iv). Although 8 U.S.C. §

1158(a)(3) bars review of determinations related to the one-year time bar for filing an asylum claim and its exceptions, the REAL ID Act of 2005 "restores our jurisdiction over 'constitutional claims or questions of law.'" *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (quoting *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005)). We held in *Ramadan* that this jurisdiction extends to mixed questions of law and fact, including the "changed circumstances" question under § 1158(a)(2)(D).

Pradhan entered the United States on a B1 visa in 1999. He changed his status to an F1 student visa, but then ceased his studies in December 2001. He was therefore out of status as of the end of December 2001. His asylum application was not filed until December 23, 2002. Pradhan does not dispute that he did not file for asylum within one year of entry, but contends that his untimely asylum application should be excused because of "changed country conditions." *See* 8 C.F.R. § 208.4(a)(4).

The IJ denied Pradhan's asylum application on the ground that Pradhan failed to establish exceptional circumstances for filing his application after one year of entry into the Unites States. The IJ also found that even if Pradhan had demonstrated changed country conditions, he had not demonstrated that he had applied for asylum within a reasonable period of time after he fell out of status and the changed country conditions were known to him. The BIA adopted and affirmed the IJ's decision. These findings are supported by substantial evidence.

Pradhan claims that it was not until

November 2002 that he learned of changed country conditions. The record does not support his contention. Pradhan fell out of status in December 2001. Throughout the following year Pradhan's family kept him informed about the political climate in Nepal. Yet it was not until November 2002, almost a year later, that he consulted an attorney to pursue his asylum claim. Pradhan testified that his reasons for waiting were that he was "waiting for money to come" and "also thought maybe things will change." Under these circumstances, the IJ properly concluded that Pradhan had not shown changed or extraordinary circumstances justifying his later application, and that one year between falling out of status and filing his asylum application was not a reasonable period.

To demonstrate eligibility for withholding of removal, Pradhan had to prove it is "more likely than not" that his life or freedom would be threatened in Nepal because of his "race, religion, nationality, membership in a particular social group, or political opinion." *See Al-Harbi v. I.N.S.*, 242 F.3d 882, 888 (9th Cir. 2001); 8 U.S.C. § 1231(b)(3). To receive protection under CAT, Pradhan had to demonstrate that "it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." *Ochoa v. Gonzales*, 406 F.3d 1166, 1172 (9th Cir. 2005); 8 C.F.R. § 208.16(c)(2).

The IJ found that Pradhan had been persecuted by Nepalese police and Maoist terrorists in Nepal in the past. However, the IJ determined (1) that changes in his family's situation in Nepal demonstrated that Pradhan's life or freedom would no longer be threatened, and (2) that Pradhan could

avoid a future threat to his life or freedom by relocating to Kathmandu with the rest of his family. The BIA agreed. Both of these findings are supported by substantial evidence.

First, Pradhan was unable to produce evidence to corroborate his testimony that the Nepalese police have an ongoing interest in him. No member of his family had been arrested or harmed since Pradhan left Nepal. Further, the same government officials that had persecuted Pradhan in the past wrote a letter stating the government was concerned for the safety of Pradhan and his family, and Pradhan obtained a replacement Nepalese passport in 2002 without incident.

Second, the BIA and IJ noted that Pradhan's family had relocated to Kathmandu and has not had any problems with the Maoists since Pradhan left in 1999. The IJ determined that there was not a "real likelihood or clear probability that the Maoists are interested in the respondent" because they have not had any contact with Pradhan or his family "for a number of years." Thus, Pradhan could avoid future persecution by joining his family in Kathmandu, where his family is currently living with incident. Under these circumstances, Pradhan did not show that he was likely to face a threat to his life or freedom or would be tortured if removed.

PETITION DENIED.